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ALEXANDER L. STEVAS
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No. 84-1369

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MANHATTAN COFFEE COMPANY,
Petitioner,
vs.
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL NO. 688,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the decision of the United States Court of Appeals for the Eighth Circuit below, which affirmed enforcement of a labor arbitrator's award holding that the award "drew its essence" from the applicable collective bargaining agreement, conflicts with the precedent of this Court to the grave detriment of the integrity of the arbitral process.

2. Whether this Court's principles governing judicial review of labor arbitrators' awards set forth 25 years ago in the *Steelworkers Trilogy* and, specifically, in *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), are vague enough to enable reviewing courts to escape their mandated responsibility of ensuring that labor arbitrators' awards are faithful to the underlying labor agreement, and should be clarified to provide guidance to reviewing courts in order to avoid enforcement of labor arbitration awards based on an arbitrator's unilateral amendment or excision of a term of the underlying collective bargaining agreement.

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No. 84-1369

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STATEMENT OF THE CASE

I. Introduction

The original complaint in this case was filed by Manhattan Coffee Company (hereinafter "the Company") seeking to vacate an arbitration opinion and award issued by Arbitrator Richard L. Ross.[1] Teamsters Local Union No. 688 (hereinafter "the Union") filed a counterclaim for enforcement of the opin-

[1] A copy of the opinion and award is reproduced in the Appendix hereto.

ion and award and for attorney's fees and costs. The district court, following cross-motions for summary judgment, entered an order and memorandum enforcing the arbitrator's decision, granting the Union costs, but denying, with certain express reservations, the Union's request for attorney's fees. The Company appealed to the United States Court of Appeals for the Eighth Circuit seeking reversal of enforcement of the arbitrator's decision, and the Union cross-appealed seeking reversal of the district court's denial of attorney's fees and a remand. In a 2-1 panel decision the Eighth Circuit affirmed the district court. The Company requested a rehearing *en banc* which was denied by five of the nine judges.

II. Decisions of the Arbitrator, the District Court and the Court of Appeals

The essential facts in this case are set forth in the decision of the Eighth Circuit. *See* Petitioner's Appendix A, pp. 2a-3a.[2] The arbitrator held that the Company's transfer of office work violated Article 28 of the collective bargaining agreement notwithstanding language therein allowing a discontinuance of a "performance of service" which was "based on sound business considerations." His holding followed an interpretation that, although the Company's action was based on sound business considerations, the exclusionary language on "performance of a service" related to work of the "service" department, not that of the office staff. The arbitrator likewise found support for his holding in a review of the history of negotiations between the parties to the agreement.

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[2] The decisions of both the Eighth Circuit and district court refer in some instances to July 1, 1983 as the date by which the Company implemented a plan which included transfer of certain payroll and accounts payable functions previously performed by the office and clerical unit. *See* Petitioner's Appendix A, pp. 2a, 2b; Petitioner's Appendix C, pp. 13a, 15a. It is clear from the arbitrator's decision and its January 14, 1983 issuance date that the correct date in question was July 1, 1982. *See* Respondent's Appendix, pp. A-2, A-5, A-8, A-9, A-16. The error, however, is not material to the decision in the case.

The district court upheld the arbitrator's decision. It found the language of the exception in Article 28 "ambiguous and subject to conflicting, reasonable interpretations when applied to the office bargaining unit," and was of the opinion that "the arbitrator's construction of the contract [was] reasonable and supported by the facts." *Manhattan Coffee Co. v. International Brotherhood of Teamsters, Local No. 688*, 571 F.Supp. 347, 351 (E.D. Mo. 1983). The district court likewise found support for sustaining the arbitrator's decision in contract terms accompanying the exception to Article 28 and the parties' bargaining history. *Id.*

The majority of the Eighth Circuit panel affirmed the lower court's decision to enforce the award, although it found the record wanting in support of the arbitrator's reliance on a history of bargaining and negotiations. The panel majority viewed the arbitrator's reading of the "performance of service" language as narrow, but not impermissible, and justified in light of other language in the exception. On this basis, it agreed with the district court that the arbitrator's interpretation of ambiguous language drew its essence from the collective bargaining agreement. The dissenting panel member agreed with the majority that the record did not support the arbitrator's reliance on bargaining and negotiating history, but disagreed that the language of Article 28 was ambiguous or that the exception therein applied only to a unit of employees apart from the office unit. In the dissent's view, the arbitrator had in effect amended the contract, and his decision, accordingly, could not be said to have drawn its essence from the agreement.

ARGUMENT

I. The Decision Of The United States Court Of Appeals For The Eighth Circuit Does Not Conflict With The Precedent Of This Court Because The Arbitrator's Award Drew Its Essence From The Collective Bargaining Agreement And Did Not Amend The Agreement Or Excise A Proviso To The Subcontracting Clause Therein.

Federal policy strongly favors the arbitration of labor disputes. 29 U.S.C. § 173(d), *Nolde Brothers, Inc. v. Bakery Workers, Local 358,* 430 U.S. 243, 254 (1977); *Iowa Beef Processors, Inc. v. Meat Cutters,* 627 F.2d 853, 856 (8th Cir. 1980). Consequently, the scope of judicial review of an arbitrator's award is extremely limited. *Johns-Manville Sales Corp. v. Machinists, Local Lodge 1609,* 621 F.2d 756, 758 (5th Cir. 1980); *Western Electric Co. v. Communication Equipment Workers, Inc., Independent,* 554 F.2d 135, 138 (4th Cir. 1976). And all doubts are to be resolved in favor of the validity of the award. *Teamsters, Local 878 v. Coca-Cola Bottling Company,* 613 F.2d 716, 717 (8th Cir. 1980); *Kewanee Machinery Div. v. Teamsters, Local 21,* 593 F.2d 314, 316-317 (8th Cir. 1979). The proper approach for courts in considering these matters is refusal to review the merits of an arbitration award, and the award must be deemed legitimate if it "draws its essence from the collective bargaining agreement." *United Steelworkers v. Enterprise Wheel & Car Corp.,* 363 U.S. 593, 597 (1960).

Under these standards, the Eighth Circuit's decision in this case was consistent with this Court's precedent. The substantive issue before the arbitrator was whether the Company violated its collective bargaining agreement with the Union when it transferred certain work out of a grievant's bargaining unit while she was on layoff. In deciding this issue against the Company, the arbitrator reached his conclusions by an analysis and interpretation of contract language in the context of the parties'

conduct. The Company contends that his analysis and interpretation manifested an infidelity to his obligations because he purportedly amended the parties' agreement by excising a proviso to the subcontracting clause. Whether the award drew its essence from the agreement in this case, therefore, turns on whether the arbitrator was engaged in legitimate interpretation or an invalid rewriting of the agreement. Respondent submits that the Eighth Circuit correctly viewed the arbitrator's opinion and award as an exercise of legitimate interpretation, and thus correctly concluded that the award drew its essence from the collective bargaining agreement.

In *United Steelworkers v. Enterprise Wheel & Car Corp.*, this Court recognized that arbitrators could exceed their powers in going beyond legitimate interpretation and application of an agreement, and cautioned against approval of such an abuse of authority:

> When an arbitrator is commissioned to interpret and apply the collective bargaining agreement he is to bring his informed judgment to bear in order to reach a fair solution of a problem...Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice...When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award. 363 U.S. at 597.

The appellate courts have heeded this caution in circumstances where an arbitrator's "interpretation" of an agreement was in reality an abandonment of it. Thus, awards have been set aside or remanded for further scrutiny where the arbitrator read into a contract an implied provision to which the parties had not agreed, *Torrington Co. v. Metal Products Workers, Local 1645*, 362 F.2d 677 (2nd Cir. 1966); where the arbitrator disregarded express contract language authorizing a company's actions

because the arbitrator viewed the action as punitive, *Amanda Bent Bolt Company v. United Auto Workers, Local 1549,* 451 F.2d 1277 (6th Cir. 1971); where the arbitrator substituted his own definition of "quit" for the contract's definition, *Timken Co. v. Local Union No. 1123, United Steelworkers of America,* 482 F.2d 1012 (6th Cir. 1973); where the arbitrator declared the contract from which he derived his power legally ineffective, *International Ladies' Garment Workers' Union v. Ashland Industries, Inc.,* 488 F.2d 641 (5th Cir. 1974), *cert. denied* 419 U.S. 840 (1975); where the arbitrator added to the contract a requirement of progressive discipline before recourse to a contractually authorized immediate discharge, *Mistletoe Express Service v. Motor Expressmen's Union,* 566 F.2d 692 (10th Cir. 1977); where the arbitrator, among other excesses, expanded the scope of the usual meaning of "notified" and declared that to deny arbitrability would lead to a deterioration of the parties' good relations, *Detroit Coil Co. v. International Association of Machinists & Aerospace Workers, Lodge No. 82,* 594 F.2d 575 (6th Cir.), *cert. denied,* 444 U.S. 840 (1979); where the arbitrator, after finding insubordination, disregarded clear contract language which allowed discharge for insubordination, and imposed an unwarranted additional burden of proof on the company to justify its contractually authorized right to discharge an employee for insubordination, *International Brotherhood of Firemen & Oilers, Local No. 935-B v. The Nestle Company, Inc.,* 630 F.2d 474 (6th Cir. 1980); where the arbitrator applied a "balancing test" on relative economic cost to the union and company of subcontracting, notwithstanding specific contract language which established the only test for subcontracting as whether the work could be more efficiently and economically done outside the bargaining unit, *Sears, Roebuck & Co. v. Teamsters, Local Union No. 243,* 683 F.2d 154 (6th Cir. 1982), *cert. denied,* 460 U.S. 1023 (1983); and, where the arbitrator introduced extraneous legislative considerations in support of his award, *Bacardi Corp. v. Congreso de Uniones,* 692 F.2d 210 (1st Cir. 1982).

In the present case, the arbitrator avoided such excesses and confined himself to a consideration of ambiguous language on "performance of a service" as it applied to the subcontracting of work performed by grievant's bargaining unit. In so proceeding, he concluded from a consideration of the parties' prior discussions on contemplated transfers of work and other language within the proviso itself that the "service" in question was work performed by another bargaining unit also represented by the Union. The Company construes the arbitrator's conclusion as a rewriting, by excision, of the contract covering the office bargaining unit on the false premise that any language which appears in that agreement must, by virtue of its inclusion, directly refer to the bargaining unit covered by the agreement. It conveniently ignores the fact that language regarding "...manufacture, packaging, or processing of a product..." also appears in the same proviso; and it characterizes the arbitrator's interpretation that the "performance of a service" language similarly refers to non-bargaining unit work as an "amendment" to the contract by way of eliminating any meaningful relevance of the disputed language to the office unit.

Such a characterization was properly rejected by the Eighth Circuit under the standard of review set forth by this Court—determining whether the arbitrator reached a rational conclusion based on the terms of the collective bargaining agreement. *United Steelworkers v. Enterprise Wheel & Car Corp., supra,* at 597. The facts before the arbitrator indicated that the parties may have had particular reasons to include language in the office agreement which applied to another bargaining unit comprised of production, warehouse, and service workers. The uncontroverted evidence before the arbitrator was that the Union and the Company were parties to two agreements covering two separate bargaining units. It is reasonable to infer that the parties were aware that the language contained in one agreement might have an impact on the meaning given to language contained in the other agreement. Therefore, it was not unlike-

ly that they would include language in the office agreement to specifically clarify their respective rights and obligations under the production agreement. And the arbitrator's conclusion that the disputed language was so included was reasonable.

His ruling, contrary to the Company's contention before this Court, was not that the provision in question had no meaning or application in the office collective bargaining agreement and was obliterated. The issue before before him was not merely whether there were sound business considerations justifying the subcontracting in question, but, even given an affirmative finding on this question, whether the "performance of a service" referred to in the proviso in Article 28 was identical to the "service presently performed, or hereafter assigned, to the bargaining unit" mentioned above in the Article. The Eighth Circuit correctly recognized that the arbitrator's construction that the two "services" in question were not identical was a permissible and justified, if narrow, construction of the contract's language.

Under well established standards set forth by this Court in *Enterprise Wheel, supra,* at 596, and reiterated in *W. R. Grace & Co. v. Rubber Workers, Local 759,* 461 U.S. 757, 764 (1983), a federal court cannot set aside an arbitrator's award simply because the court believes its own interpretaion would be better than the arbitrator's. The Eighth Circuit has recognized this limitation on its role in reviewing such awards. *Lackawanna Leather Company v. United Food & Commercial Workers International Union,* 706 F.2d 228, 232 (8th Cir. 1983). It sustained the award in the present case because it properly recognized that to deny enforcement would be to substitute its interpretation of ambiguous contract language for the arbitrator's. Its decision was thus entirely consistent with the precedent of this Court that an award must be enforced if it draws its essence from the collective bargaining agreement.

If, as Petitioner contends, the arbitrator had rewritten the parties' agreement by deleting one of its provisions, the decision of the Eighth Circuit in this case would indeed have been con-

trary to this Court's precedent in *Enterprise Wheel*. The arbitrator here, however, did nothing more nor less than decide that one of several exceptions to a prohibition against subcontracting bargaining unit work did not apply in the circumstances presented for his resolution. In sustaining his award, the decision of the Eighth Circuit does not conflict with this Court's standards for review of arbitral awards.

II. The Supreme Court's Principles Governing Judicial Review Of Arbitration Awards Are Sufficiently Clear To Enable Reviewing Courts to Ensure That Labor Arbitrators' Awards Are Faithful To Labor Agreements And Do Not Need Clarification Through A Review Of The Present Case To Avoid Enforcement Of Awards Which Undermine Those Agreements.

Although twenty-five years have passed since this Court enunciated standards for review of arbitration awards, the principles set forth in the *Steelworkers Trilogy* remain viable as a guide for court considerations of requests for such review. *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steel Workers of America v. Enterprise Wheel & Car Corp., supra.* Those decisions affirmed a federal preference for binding arbitration as the method for resolving disputes arising over the interpretation and application of collective bargaining agreements among parties who have chosen this vehicle as the means for resolving conflicts. Because the parties in such instances bargain for an arbitrator's construction of their agreement, the courts should not substitute their judgment for the arbitrator's by reviewing the merits of a dispute properly brought before him for resolution. The effect of such plenary review would be to eliminate the very finality of resolution which the parties sought in choosing arbitration as the preferred method for settling differences over the meaning and effect of their agreement.

This preference for nonjudicial dispute resolution as a means to achieve industrial stability did not, however, divest the courts of all supervision over the performance of arbitrators. Inasmuch as the arbitrators' jurisdiction and scope of authority are rooted in the parties' collective bargaining agreements, the exercise of that authority in issuing arbitral decisions is subject to court review to ensure that arbitrators have remained faithful to their charter as interpreters of the meaning and application of those agreements, and to protect the parties against an abuse of power by arbitrators who set themselves above the parties and agreements by dispensing their own brands of industrial justice. Such a safeguard was ensured by this Court when it mandated that reviewing courts set aside any arbitral award which does not draw its essence from the underlying agreement, *United Steelworkers of America v. Enterprise Wheel & Car Corp., supra,* at 597.

Reviewing courts have variously identified how an award can be said to have drawn its essence from the collective bargaining agreement. An award which "put forward a passably plausible - even if perhaps erroneous - analysis" of the collective bargaining agreement was enforced by the Fifth Circuit. *Safeway Stores v. America Bakery and Confectionary Workers International Union,* 390 F.2d 79, 83 (5th Cir. 1968). The Third Circuit has stated:

> [W]e hold that a labor arbitrator's award does "draw its essence from from the collective bargaining agreement" if the interpretation can in any rational way be derived from the agreement, viewed in the light of its language, its context, and any other indicia of the parties' intention; only where there is a manifest disregard of the agreement, totally unsupported by principles of contract construction and the law of the shop, may a reviewing count disturb the award. *Ludwig Honold Mfg. Co. v. Fletcher,* 405 F.2d 1123, 1128 (3rd Cir. 1969).

The Ninth Circuit has stated that it will affirm an award "if, on its face, the award represents a plausible interpretation of the contract in the context of the parties' conduct." *Holly Sugar Corp. v. Distillery Workers International Union,* 412 F.2d 899, 903 (9th Cir. 1969). The Second Circuit has confirmed awards "when arbitrators explain their conclusions... in terms that offer even a barely colorable justification for the outcome reached." *Wire Service Guild, Local 222 v. United Press Internationa, Inc.*, 623 F.2d 257, 261 (2nd Cir. 1980), quoting *Andros Compania Maritima v. Marc Rich & Co., A.G.*, 579 F.2d 691, 704 (2nd Cir. 1978). The Tenth Circuit has required rational support and an absence of contrariety to express contract language as a basis for upholding an award. *Fabricut, Inc. v. Teamsters, Local 523,* 597 F.2d 227 (10th Cir. 1979). And it has approved an arbitrator's resolution of "tension" between extra-contractual shop rules and contract requirements for "good and sufficient cause" for discharge as a legitimate exercise of contract interpretation. *Campo Machinery Co., Inc. v. Local Lodge No. 1926,* 536 F.2d 330, 333 (10th Cir. 1976).

Decisions of the Eighth Circuit, including that in the present case, are consistent with decisions of other courts of appeal and the standards set forth by this Court. Citing with approval decisions of the Tenth and Sixth Circuits in *Campo Machinery Co. Inc., supra,* and *Timken Co., supra,* respectively, the Eighth Circuit affirmed enforcement of an award which resolved tensions between company rules and a contract provision on discharge, concluding that the award drew its essence from the collective bargaining agreement because the arbitrator simply interpreted two conflicting contract provisions. *Kewanee Machinery Div. v. Teamsters Local No. 21, supra,* at 318. In some instances, the same Circuit has held, an arbitrator's award must be sustained even if the arbitrator must technically go outside the four corners of an agreement to resolve a dispute arising under that agreement - in this case to a prior agreement, because the history of negotiations on the current agreement did not shed light on a grievant's current seniority rights, which had

vested under the prior agreement. *Rainbow Glass Co. v. Teamsters, Local 610,* 663 F.2d 814 (8th Cir. 1982). Unless the evidence gives a reviewing count positive assurance that a collective bargaining agreement is not susceptible to the arbitrator's interpretation, this Circuit will enforce the award. *Electrical Workers, Local 53 v. Sho-Me Power Corp.*, 715 F.2d 1322 (8th Cir. 1983). Framed in the positive, the Eighth Circuit will, as has the Third Circuit in *Ludwig Honold Mfg. Co., supra,* and the Tenth Circuit in *Fabricut, Inc., supra,* uphold an award if the arbitrator reaches a rational conclusion based on construction of the underlying collective bargaining agreement. *Lackawanna Leather Company v. United Food & Commercial Workers International Union, supra.*

This Court has recently reiterated its "well established standards for the review of labor arbitration awards":

> [A] federal court may not overrule an arbitrator's decision simply because the court believes its own interpretation of the contract would be the better one. *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960). When the parties include an arbitration clause in their collective bargaining agreement, they choose to have disputes concerning constructions of the contract resolved by an arbitrator. Unless the arbitral decision does not "dra[w] its essence from the collective bargaining agreement," *Id.*, at 597, a court is bound to enforce the award and is not entitled to review the merits of the contract dispute. This remains so even when the basis for the arbitrator's decision may be ambiguous. *Id.*, at 598. *W.R. Grace & Co. v. Rubber Workes, Local 759, supra,* at 764.

The decision of the Eighth Circuit in the present case does not conflict with these standards. Petitioner argues that the arbitrator here rewrote the parties' agreement by excising the "sound business considerations" exception to the prohibition against subcontracting. Respondent submits that the focus of

the contention is misplaced. The excepting clause identifies several functions which can be added or discontinued, provided the addition or discontinuance is based on sound business considerations, without violating the restrictions against subcontracting office bargaining unit work. Adding or discontinuing any one of these functions, even though some or all of them involve work performed by employees outside the office bargaining unit, could arguably have an effect upon work performed by bargaining unit members. It is reasonable to infer from the juxtaposition of the prohibition clause and exception clause in Article 28 that the parties simply wanted to foreclose potential disputes over the prohibition against subcontracting bargaining unit work should the Company implement sound business decisions in other areas involving non-bargaining unit employees. When the arbitrator found that the disputed work transferred in this case was not the "performance of a service" mentioned in the exception clause, he was merely interpreting what he found to be ambiguous language in that clause. By virtue of the relationship between the prohibition clause and the exception clause, this meant that the transfer fell within the prohibition clause, and that the entire exception clause was inapplicable in this instance.

In this light, whether or not the Company's action was prompted by "sound business considerations" became irrelevant. Accordingly, the arbitrator need not have made a finding on the Company's motives in making the change. He had already found that the entire exception clause was inapplicable in the present context. The fact that he did make a finding on the Company's motives may have been frustrating to the Company in light of his more crucial finding that the disputed work was outside the scope of the exception clause. But the arbitrator did not thereby rewrite the agreement by excising the clause, or the proviso therein. Assuming evidence supports the conclusion, a finding that a particular clause in a collective bargaining agreement does not apply in the circumstances of a given dispute does not delete that clause from the agreement.

In rejecting the Company's argument that the arbitrator did excise a portion of the agreement in this case, the Eighth Circuit was thus not embarking on a novel approach to review of arbitral awards. The Ninth Circuit, for example, rejected a similar contention in *Edna H. Pagel, Inc. v. Teamsters, Local 595,* when it affirmed a lower court's confirming of an award where the arbitrator interpreted a prohibition against discharge to preclude permanent replacement of strikers. 667 F.2d 1275, 1279 (9th Cir. 1982). Petitioner, of course, disagrees with the Eighth Circuit's conclusion that the arbitrator in this case interpreted, however narrowly, but did not rewrite the contract. But there is no indication that the Eighth Circuit was confused by any uncertainty as to this Court's standards for review of arbitration awards. On the contrary, the decision specifically states that "the arbitrator cannot amend the contract." *Manhattan Coffee Company v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 688,* ____ F.2d ____ (8th Cir. 1984); Petitioners Appendix, p. 4a. Similarly, the Ninth Circuit in *Pagel* recognized the same caveat against sanctioning an arbitrator's refashioning of an agreement when it concluded:

> Certainly, an interpretation, which prohibits replacement "draws its essence" from the contractual bar against discharge, and whether or not we agree with this interpretation, we cannot say it is implausible or that it modified the contract. *Edna H. Pagel, Inc. v. Teamsters, Local 595, supra,* at 1279.

Petitioner suggests that the Sixth Circuit would have reached a different conclusion in this case, citing by way of example *Torrington Co. v. Metal Products Workers, Local 1645, supra,* and *International Brotherhood of Firemen & Oilers v. The Nestle Company, Inc., supra.* Respondent submits that the result would have been the same. In *Torrington,* the arbitrator was found to have added an implied provision to the agreement, a far different question from whether the arbitrator disregarded,

to the point of excising, the exception clause in this case. In *Nestle*, an award was vacated because the arbitrator's findings of facts which constituted insubordination had an immediate and direct bearing on whether a discharge was proper under an express provision justifying discharge for insubordination, whereas here, as was discussed above, the arbitrator's finding of "sound business considerations" was irrelevant to the arbitrator's holding once he found that the entire exception clause did not apply in this instance. Whatever the Sixth Circuit's conclusion would have been in this case, the standards set forth by this Court in the *Steelworkers Trilogy* and reiterated in *W.R. Grace & Co.* provide clear guidance for reviewing courts: courts may not substitute their interpretations for the arbitrator's; the merits of an award are not subject to review even when the basis for the award is ambiguous; and the award must derive its essence from the collective bargaining agreement in order to be sustained.

The appellate courts have found little difficulty in following these standards in reviewing arbitral awards. And the present case presents no novel departure from those standards which would warrant this Court's consideration of the case or justify redefinition of long established standards which have served the arbitral and review process well.

CONCLUSION

For the foregoing reasons, Respondent respectfully prays that the petition for a writ of certiorari be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

ARBITRATION OPINION AND AWARD

In the Matter of Arbitration Between:

Manhattan Coffee Company,
Employer

and

International Brotherhood Of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local Union No. 688,
Union.

FMCS No. 82K/28920
File No. 8251

Richard L. Ross, Esquire
Arbitrator

Date of Hearing:
December 7, 1983

Place of Hearing:
St. Louis, Missouri

Grievant: Patricia Schwenck

APPEARANCES:

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This is a matter of private arbitration between MANHATTAN COFFEE COMPANY (hereinafter sometimes referred to as "Company" or "Employer") and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, Local Union No. 688 (hereinafter sometimes referred to as "Union") in accordance with the Collective Bargaining Agreement between the parties. This arbitration arises from the filing of a grievance by PATRICIA SCHWENCK (hereinafter sometimes referred to as "Grievant") who alleges therein wrongful layoff. Under the arbitration procedures established by the parties, an "Arbitration Board" is created to which the Union and the Company each select one member. The undersigned was selected as the third member of the Arbitration Board under established procedure. Hearing was held on December 7, 1982 in St. Louis, Missouri. All parties appeared and were afforded full opportunity to examine and cross-examine witnesses and to present evidence and arguments in support of their respective positions.

FACTS

The Company for many years was engaged in the business of producing and distributing coffee and coffee products. In addition, the Company leased coffee-making equipment to commercial accounts and serviced said equipment. Until July 1, 1982, the Company employed in its St. Louis production warehouse and service facilities thirty-five members of the Union, and in its St. Louis offices, ten who were also members of the Union. The production workers were in one bargaining unit and the office workers in another bargaining unit. (Hereinafter the two units will sometimes be referred to as the "production unit" and the "office unit.") Grievant was employed for approximately twelve years in the office and was a member of the office unit. Grievant's duties included taking telephone orders for service calls and relaying the calls to the service department in the production unit, handling the documentation of "loan"

agreements with customers, and backing up the receptionist when necessary. Grievant spent approximately four hours each day taking orders for service calls and relaying messages to the service department.

The Collective Bargaining Agreements for both the office and the production bargaining units expired June 30, 1982. In early 1982, the Company informed the Union that because of severe economic problems, the St. Louis operation would be closed. Sales volume had decreased by sixty-five percent even though the number of employees remained the same. When the Union was informed of that fact, representatives asked what could be done to save some of the jobs. The parties thereupon entered into discussions and the discussions developed into negotiations. By April 1, 1982, an agreement was reached. The Union agreed that production would not continue in the St. Louis facility but that the Company would operate a distribution warehouse, a service department, and its offices from the St. Louis facilities. It was understood that the Company would reduce its warehouse service employees from thirty-five to ten or twelve people, approximately five of whom would perform warehouse duties and five or six of whom would perform as service representatives. With respect to the office, it was understood that the office complement would be reduced from ten to five employees. Although the plan for the reduction in staff of the production and warehouse employees was specific, there were no specific plans for the reduction in the office staff. When the Union inquired as to how the reduction in office staff would take place, the Company responded that its office operation would be streamlined, made more efficient, and the remaining employees would be expected to pitch in and work harder.

The Union agreed generally to the plan, excepting that it was also agreed that six weeks after the implementation of the plan, if problems developed, the Company and Union would meet in order to resolve such problems.

During the negotiations, the parties discussed many and varied matters including who would be laid off in the production and warehouse and service departments. Only one seniority list was maintained and it was decided that the most senior employees would be given an opportunity to do service work and would be given training by the Company. With respect to the office unit, the decision as to who would be laid off was to be by seniority only. Grievant was number six on the seniority list and therefore was the employee with the highest seniority who was laid off. Those employees who were to be laid off were given the election to receive severance pay instead of being laid off. Grievant, believing that the office could not function with only five employees, was the only employee who elected to take the layoff, giving due regard to the fact that she was next in line in seniority and would be the first to be called back. The others chose severance pay.

Even after the basic agreement was completed, discussions continued, and on or about May 18, 1982, the Union agreed that "in order to complete work in an efficient manner by the end of the day and/or adhere to customer service needs on an immediate basis, from time to time, supervisors will work hand in hand with bargaining unit employees", (in the office and clerical unit).

On or about June 25, 1982, the parties entered into an agreement providing that if an employee needs some time off to seek another job, the Company and Union would work together to see to it that the employee could have time off to seek other work. In addition, the Company agreed in writing to recognize the Union as a bargaining representative of its plant employees if the production facilities would ever be returned to the St. Louis facility. The agreement further provided as follows:

> "The parties agree that any and all present or future rights of Company employees found in the present Collective Bargaining Agrement and any future Collective Bargaining

Agreements are extinguished and of no further force and effect beyond the date the employee is permanently laid off or finds other employment as provided for above."

At some time during the discussions (during negotiations prior to April, 1982, according to a Company witness, and after negotiations but prior to June 30, 1982, according to a Union witness) the Company informed the Union of its plan to have telephone calls for repair made directly to the service department instead of going through the office clerical unit (the job that Grievant performed). The Union made known its objections, but when informed that the amount of time involved per day was less than one hour, the Union agreed that the new procedure would present no problems.

On June 30, 1982, the plan was implemented. The production of coffee was transferred to the facilities of the Company's parent corporation in Oklahoma City, Oklahoma. Approximately twenty-four employees in the production bargaining unit were laid off or terminated. Only five warehousemen were retained. Of the eight servicemen, two were laid off or terminated and six were retained. With respect to the office clerical unit, four elected to take severance pay and were terminated. Grievant was placed on layoff. Telephone service calls were thereafter routed directly into the service department. The payroll and most of the accounts payable functions previously performed by the office clerical unit were transferred to the office of the parent corporation in Oklahoma City. The payroll and payables were then put on the master computer at the Company's home office. On July 26, 1982, Grievant filed her grievance, complaining that the Company took away work from the bargaining unit while whe was on layoff. She demanded full back pay and recall.

On July 27, 1982, the Grievant's supervisor called her at home and asked her why she filed the grievance. Grievant explained why and wanted to know when the six-week meeting

would be held. Grievant was told that to the knowledge of her supervisor, there was no meeting scheduled. Thereafter, her supervisor told Grievant that he would be in Oklahoma City until the following Monday and requested that she "sit tight" until Monday and have the business representative call him on Monday. Also on July 27, 1982, the Company denied the grievance in writing.

On August 5, 1982 (Thursday), the Union requested that the Company waive the provisions of the two-man adjustment board and go directly to arbitration. On August 9, 1982, the Company refused to wavie the two-man adjustment board and informed the Union that, pursuant to Article 18, Section 3, its time to request the adjustment board had expired.

A two-man adjustment board meeting was held on August 25, 1982, but the board was deadlocked. Thereafter, the parties agreed to submit the issue of arbitrability and the substantive issues if the board found that the matter was arbitrable.

The effective date of the current Collective Bargaining Agreement was July 1, 1982.

PERTINENT CONTRACT PROVISIONS

Article 22

MANAGEMENT RIGHTS

The Company retains the exclusive right to manage its business and to direct its employees. The Company in the exercise of its right herein shall observe the provisions of this Contract.

Without in any way limiting the generality of the foregoing, the right to manage its business and to direct and control its employees includes but it not limited to:

1. The right to hire, supervise and train employees;
2. The right to suspend or discharge for cause its employees in accordance with the provisions of this Contract;

3. The right to establish, continue, discontinue, or modify Company business practices, rules or regulations;

4. The right to determine the existence, location and equipment of each company facility.

Article 27

WORK ASSIGNMENTS

The Employer agrees to respect the jurisdictional rules of the Union and shall not direct, require, or allow persons other than the employees in the bargaining unit here involved to perform work which is recognized as the work of the employees in said unit.

Article 28

SUBCONTRACTING

The Employer agrees that no function or service presently performed, or hereafter assigned, to the bargaining unit shall be subcontracted, leased, assigned or conveyed in whole or in part to any other person or organization, if any member of the bargaining unit is, at the time of such action, on layoff due to lack of work. The Employer agrees that the layoff proviso shall not be applicable until July 1, 1983.

The above language shall not be construed or interpreted to prohibit the Employer from adding or discontinuing manufacture, packaging, or processing of a product or performance of a service based on sound business considerations.

OPINION AND AWARD

I

ARBITRABILITY

The Company contends that the arbitrator is without jurisdiction or authority to hear this matter as two separate and independent time limitations contained in the grievance procedure were violated by the Union. The first separate time limitation appears in Section 1 of Article 18 and provides that, "The aggrieved employee or employees shall first take the matter up with the shop steward who in turn will take the grievance up with the foreman or forelady in charge of the department *within five days of thc occurrence."* (Emphasis added) The Company asserts that the "occurrence" complained of occurred on July 1, 1982, and neither the Union nor the Grievant claimed that they were unaware of the subcontracting which occurred thereon. As the grievance was not filed until July 26, 1982, the Company submits that the filing thereof was untimely.

The second separate time limitation appears under Section 3 of Article 18, wherein it is provided that, "If a grievance cannot be settled under Sections 1 and 2 of this Article, it shall be submitted to a two-man adjustment board within three (3) working days." The evidence established that although the Company denied the grievance in writing thereby completing steps one and two on July 27, 1982, the Company did not hear from the Union until a letter dated August 5, 1982 was received by the Company requesting the Company to waive the two-man adjustment board.

A grievance was filed on July 26, 1982, protesting that the Company took away work from the bargaining unit while on layoff. All parties are in accord that work was initially transferred out of the office on July 1, 1982. The Company contends that was the date of the "occurrence" which triggered the running of the five-day time limitation in Section 1 of Article 18.

The charge levied against the Company by the Grievant was violation of Article 27 and Article 28 of the Collective Bargaining Agreement pertaining to work assignments and subcontracting. The transfer of work out of the bargaining unit commenced on July 1, 1982 and continued on a daily basis thereafter. Although the initial occurrence was on July 1, 1982, there was a continuing transfer of work up to the time of the filing of the grievance. Thus, the occurrences were of a continuing nature. Section 1 of Article 18 requires the filing of a grievance within five days of the "occurrence". The language does not require the filing of a grievance within five days of the "initial" occurrence, and, therefore, when there is a charge of a violation which is of a continuing nature, it can well be argued that a greivance can be filed within five days of any of the occurrences. But even more persuasive is the fact that the parties agreed to meet and discuss any problems which might arise within six weeks after implementation of the reduction in working staff.

Arbitral authority is replete with rulings to the effect that a party to a collective bargaining agreement waives its right to rely on strict adherence to procedural niceties by discussing a grievance on the merits. In *Sperry Rand Corp.*, 60 L.A. 1189 (King, 1973), the arbitrator held timely a grievance that was orally discussed by the company and the grievants on the seventh day, in the face of a contract provision which read:

> "Any grievance...shall be officially presented...in writing within seven (7) working days, [sic] after it arises, or it shall not be considered by...the Employer."

In *Associated School Bus Service,* 72 L.A. 861 (Krebs, 1979), the arbitrator held that a discussion between the parties on the merits waived the requirement of a written grievance. Arbitrator Krebs stated the general policy as follows at page 862:

> "Other arbitrators have held that 'doubts as to the interpretation of contractual time limits or as to whether they have been met should be resolved against forfeiture of the

right to process the grievance.' Elkouri and Elkouri, "*How Arbitration Works*", (3rd Edition, 1973, page 149)."

A thorough revies of the *Associated School Bus Service* opinion demonstrates that the arbitrator felt that the actual notice of a grievance is the key element. Actual knowledge of the grievance also leads to the refusal to follow a written grievance requirement in *Walker Boudwin Construction Co.*, 55 L.A. 917, 922 (Kenaston, 1970).

It is sound industrial policy, and well-established in the arbitral area that discussion of the merits of a grievance waives the right of a party to rely on the technical procedural provisions of the contract. *Weirton Steel Co.*, 54 L.A. 1049 (Kates, 1970); *Interscience Encyclopedia, Inc.*, 55 L.A. 210 (Roberts, 1970).

Herein, there was a specific agreement to discuss within six weeks after implementation of the reduction in working force any problem which may arise. It is evidence that the parties intended to hold off discussing individual concerns for six weeks and then address all of the problems which may arise. It would thus appear that the parties agreed to waive the requirements of Article 18 with respect to the filing of grievances pending the anticipated meeting to be scheduled within the period of six weeks. On the basis of such agreement the arbitrator finds an express waiver of the time limitations set forth in Article 18.

As to the contention of the Company that the Union failed to submit the dispute to a two-man adjustment board within three working days, the finding that there was a waiver also applies. Furthermore, there was a conversation between the Grievant and her supervisor wherein Grievant was advised to sit tight until the following Monday (August 2, 1982). On August 5, 1982, the Union requested waiver of the two-man adjustment board. On August 9, 1982, the Company refused the request.

It is evident that not only were discussions taking place, but there was an express request made by the Company to "sit tight" or, in other words, to delay going forward with the particular grievance filed herein until August 2, 1982. On August 5, the request to waive the two-man board was made by the Union. It was not until August 9, 1982 that the Company responded. It was also not until August 25, 1982 that the two-man adjustment board met, certainly more than three days after the Company had refused the Union's request to waive the board. No evidence was adduced concerning the cause of the delay (from August 9 to August 25).

Under Section 3 of Article 18, there is no indication of *who* is responsible for the submission of a dispute to the two-man adjustment board. Instead, Section 3 of Article 18 simply provides that "it", meaning "the dispute", shall be submitted. Thus, it is the joint responsibility of both parties, i.e., the Union and the Company, to make a submission to the two-man adjustment board within the three-day designated period. The Company may not charge the Union with failure to make a timely submission unless it is shown that the failure to make such submission was the fault of the Union. No such showing was made herein. For the aforesaid reasons, the arbitrator finds that the matter is arbitrable and the arbitration board has jurisdiction.

II

SUBSTANTIVE ISSUES

The Union contends that the Company violated Article 28, headed, "Subcontracting", wherein it is provided that no function or service previously performed shall be subcontracted if any member of the bargaining unit is, at the time of such action, on layoff due to lack of work. Article 28 further provides that its language shall not be contrued to prohibit the Company from "adding or discontinuing manufacture, packaging, or processing of a product of performance of a service *based on sound business considerations.*" (Emphasis added)

The Union also refers to Article 27, headed, "Work Assignment", which provides that the Company "... shall not direct, require, or allow persons other than the employees in the bargaining unit here involved to perform bargaining unit work which is recognized as the work of the employees in said unit."

The Company contends that transferring the payroll and payable work to its parent headquarters and transferring the receipt of customer service calls from the office unit to the service unit is not violative of either the provisions of Article 28 or Article 27. The Company points out that Article 28 specifically allows the Company to discontinue "performance of a service based on sound business consideration." The Company further argues that Article 27 was meant to apply only to non-subcontracted work assignment disputes such as supervisors performing bargaining unit work.

It is uncontroverted that the rationale of the Company's transferring or subcontracting the payroll and payable work and the telephone answering formerly performed in the office unit was based upon a good faith belief that it would improve efficiency and save the Company money. It is clear the Company's action was based on sound business considerations. Thus the Company contends that the exclusionary language in Article 28 applies. Such language relied upon by the Company provides that the prohibition against subcontracting shall not be construed as to prohibit the Company from "adding or discontinuing manufacture, packaging, or processing of a product or performance of a service based on sound business considerations."

The exclusatory language of Article 28 upon which the Company relies does not refer to the type of work regularly performed by the office staff. The exclusatory language only refers to production work performed in the plant and warehouse and service work performed in the service department by members of another bargaining unit. The use of the term "performance of service" in the exclusionary language was clearly meant to apply

to the "service" department which regularly performs service functions for the customers of the Company. To enlarge the scope of such language to include office functions regularly performed not to service customers but to maintain records (payroll and payables) is reaching, unreasonable, and would be an absurd interpretation of the contract language.

It is clear that such language was meant to apply to the production, warehousing and service classifications represented by the same Union but in a different bargaining unit. In fact, the Union had specifically agreed to discontinue the production in St. Louis but had never agreed to discontinue the payroll and payable functions regularly performed by the office unit. Although the Union did agree to the elimination of telephone answering duties with respect to service calls, the Union did so in the belief that such work was negligible (one hour per day for one employee). Therefore, it is evident that the exclusionary language in Article 28 upon which the Company relies was never intended to apply to the office unit. The functions of the office were not mentioned therein, even though the functions of the production, warehousing and service units are mentioned specifically. Under will accepted standards for interpreting contract language, to expressly include one or more of a class must be taken as an exclusion of all others.

Thus, it appears that the parties agreed to the transfer of production and service work but not the transfer of office work. This conclusion is buttressed by a review of the history of the negotiations between the parties.

After the Union was advised that the Company planned to close its St. Louis operation, the Union announced its willingness to discuss changes in order to save as many jobs as possible. During the negotiations which followed, the parties discussed many and varied matters, including the closing of the St. Louis production facility whose work was to be performed elsewhere. Also discussed was the reduction of staff in the

warehouse and service areas and also in the office unit. When the Union inquired as to how the reduction of office staff would be accomplished, the Company responded that is office operation would be streamlined, made more efficient, and the remaining employees would be expected to pitch in and work harder. Based thereon, it was agreed that the office staff would be reduced from ten to five. No discussion of the transfer or subcontracting of work out of the office took place excepting only with respect to the transfer of the work of answering telephone calls into the service unit. When the Union inquired as to how much time was involved, a Company representative responded incorrectly (although unintentionally) that the transfer of such work involved only one hour a day, whereas, actually such work took approximately four hours a day. The Union had no objection to the transfer of one hour a day work, considering that such amount of work was negligible. By negative inference it can be concluded that the Union did have objection to the transfer of work which took a more substantial amount of time.

Although it was understood that the production work formerly performed in St. Louis would be transferred or subcontracted out, there was no understanding or agreement that any of the office work would be transferred or subcontracted out, excepting only the one hour of telephone answering duties.

The Company refers the arbitrator to the newly negotiated language in Article 22 - "Management Rights", which reserves to the Company its right to "establish, continue, discontinue or modify Company business practices, rules or regulations." The Company claims its right to transfer the payroll and payable and the receipt of customer service calls under such provision. Except to the extent as modified by the specific terms of its Collective Bargaining Agreement, the Company may exercise all legitimate and residual rights including the right to subcontract and transfer work. However, in the instant case, Articles 28 and 27 specifically restrict the Company in the exercise of its

right to subcontract or assign work out of the bargaining unit. Thus the general provisions of the management's rights clause do not bestrow [sic] upon the Company rights which it had negotiated away.

Under Article 28, the restriction upon the right of the Company to subcontract applies when a member of the bargaining unit is on layoff due to lack of work. However, the Company also therein agreed that the layoff provision does not become effective until July 1, 1983. Thus, it appears that the parties intended the prohibition against subcontracting to be absolute and not limited in any way until July 1, 1983, when the layoff provision takes effect. On the basis thereof and for the reasons as aforesaid, the arbitrator finds that the transfer, assigning and/or subcontracting of work out of the office bargaining unit was violative of Article 28.

Under the evidence adduced, and in accordance with the foregoing Opinion, and for the reasons stated therein, the grievance is sustained. The Company is hereby directed to cease and desist transferring, subcontracting or assigning work previously performed by members of the office bargaining unit out of the office bargaining unit. The Company is further ordered to make Grievant whole by compensating her with full back pay, less interim earnings and unemployment compensation she may have received, if any, from the date she filed her grievance (July 26, 1982) to the date the Company ceases and desists transferring, subcontracting or assigning work out of the bargaining unit or to the date of Grievant's recall, whichever occurs first; providing that unemployment benefits shall not be deducted from the back pay if Grievant is required to repay, and does repay, the amount of any such benefit to the proper governmental authority. It is further ordered that the arbitration board shall retain its jurisdiction for the sole purpose of resolving any dispute which may arise with respect to the monetary aspects of this award.

Dated this 14th day of January, 1983.

/s/ Richard. Ross
RICHARD L. ROSS, Arbitrator

The undersigned hereby concurs in/dissents from the foregoing Opinion and Award.

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